# No. 9474

IN THE

# United States Circuit Court of Appeals

**For the Ninth Circuit**

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| SOUTHERN PACIFIC COMPANY (a corporation), *Appellant,* | |
| vs. | |
| JOE CONWAY, *Appellee.* | |

## APPELLEE'S BRIEF

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SOUTHERN PACIFIC COMPANY (a corporation),
*Appellant,*

vs.

JOE CONWAY,
*Appellee.*

---

# APPELLEE'S BRIEF

(The parties are designated as in the trial court: i. e. appellant as "plaintiff", appellee as "defendant.")

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## I. JURISDICTION

There was a want of jurisdiction in the District Court for the reason that no case or controversy is presented by the record within the judicial powers conferred upon courts of the United States by Section 2, Article III, of the Constitution of the United States.

The suit was originally brought in the District Court by the plaintiff filing, on April 18, 1939, a complaint seeking a declaratory judgment declaring the Arizona Train-Limit Law unconstitutional.

The answer of the defendant denied the jurisdictional allegations of the complaint and admitted the allegation

going to the question of the constitutionality of the law. No controversy was then presented by the pleadings.

Likewise in his deposition and at the Pre-Trial Conference defendant denied the allegations of the complaint going to the question of the jurisdiction of the Court and admitted the allegations of the complaint going to the question of the constitutionality of the law and no controversy is presented within the judicial power of a United States Court.

Judgment was entered by the District Court dismissing the suit for want of controversy.

Jurisdiction in this Court to entertain and decide the case upon appeal is claimed by plaintiff under Section 225, Title 28, U. S. Code.

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## II. STATEMENT OF THE CASE

Defendant accepts the plaintiff's statement of the case except the conclusions drawn by plaintiff from the facts stated. Since we believe that the question of the conclusions to be drawn from the facts is more properly a part of the argument, we reserve a discussion of this question as a part of our argument.

Two questions are involved in the appeal:

1. Did the Trial Court err in amending its order on the Pre-Trial Conference?

This question arises by reason of the order of the District Court, entered on motion of defendant, amending the order entered on the Pre-Trial Conference.

2. Did the Trial Court err in entering judgment dismissing the suit for want of controversy?

This question arises on the judgment entered by the District Court.

## III. SUMMARY OF ARGUMENT

**1. The District Court properly exercised its discretion in amending its order entered on the Pre-Trial Conference.**

(a) The original order on Pre-Trial Conference wherein it was stated that defendant admitted all the allegations of paragraph I of the complaint was contrary to the record and the order was properly entered amending the order on Pre-Trial Conference to show the allegations of paragraph I(b) of the Complaint were denied by defendant.

(b) The original order on Pre-Trial Conference was properly amended to show the defendant denied that part of paragraph XVI of the complaint reading as follows:

> "As heretofore alleged, said defendant claims and maintains that it is and will be his duty, as Attorney General, to prosecute and sue plaintiff for each and every violation of said Act which it may commit."

The record on the Pre-Trial Conference clearly shows that the admission of this allegation by counsel at such conference was inadvertent and unintentional and the amendment was proper in the interest of justice.

The admission of this allegation caused a contradiction in the record on the Pre-Trial Conference and it was proper for the Trial Court to determine the true situation and to correct the record accordingly.

**2. A case or controversy within the judicial power of a United States Court is not presented by the record and the District Court properly dismissed the suit.**

(a) No opposing claims are presented in the record as to the constitutionality of the Arizona Train-Limit Law or as to the powers and duties of the defendant with respect to the enforcement of the Arizona Train-Limit Law, and so no controversy.

(1) Defendant never claimed or maintained the Arizona Train-Limit Law is constitutional or imposed upon him, either in his individual or official capacity, a power or duty of enforcement.

(2) No duty of enforcement is imposed upon defendant, either in his individual or official capacity, by reason of a presumption in favor of the constitutionality of the law.

An unconstitutional act is not a law.

(b) If opposing claims were presented, the question is academic and presents no case or controversy within the judicial power of a United States Court.

(c) The defendant, Joe Conway, in his individual capacity, the capacity in which he is sued, has no interest in the subject matter of the complaint and action sufficient to give rise to a controversy.

**3. The action is against the State and barred by the Eleventh Amendment to the Constitution of the United States.**

**4. The motion to remand was properly denied.**

(a) The matter sought to be presented by supplemental complaint has no relevancy to the question raised by the original record.

(b) The situation presented by the Motion to Remand and Response to Motion to Remand shows the jurisdictional amount is not involved.

(c) The situation presented by the Motion to Remand and Response to Motion to Remand shows a want of equity jurisdiction.

## IV. ARGUMENT

### 1. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN AMENDING ITS ORDER ENTERED ON THE PRE-TRIAL CONFERENCE.

**(Specification of Error No. 1)**

On the order of the District Court a Pre-Trial Conference was held below, following which the District Court entered its order as to admissions of fact by the defendant (R. 92). The defendant then moved to amend the order (R. 93), which motion the District Court granted (R. 96). The action of the District Court in amending the order on Pre-Trial Conference is assigned as error.

By the amendment certain allegations in paragraph I(b) and in paragraph XVI of the complaint, shown by the original order as having been admitted, were shown as denied.

#### (a) Paragraph I(b)

The original order on the Pre-Trial Conference stated that *all* the allegations contained in paragraph I of the plaintiff's complaint were admitted. In this the order was contrary to the record.

Paragraph I(b) of the complaint, in part, alleged that under the Constitution and laws of the State of Arizona there was vested in the defendant, as Attorney General, the exclusive power and the mandatory duty by prosecutions to enforce the Train-Limit Law. Both in his answer (R. 53, 54) and at the Pre-Trial Conference (R. 76, 77, 78) the defendant admitted these allegations *only* as applied to a *constitutional* law and expressly denied that any power or duty was imposed by reason of any presumption of constitutionality (R. 76). Plaintiff recognizes that such is the record (Appellant's Brief, p. 6, 7, 36).

Since the allegation was admitted *only* as it applied to a constitutional law, it was denied insofar as it applied to an

*unconstitutional* law. The defendant having thereafter admitted the allegations of the complaint going to the merits, and in effect, if not in fact, having admitted the unconstitutionality of the Arizona Train-Limit Law, the answer to the above allegations of paragraph I(b) of the complaint becomes a denial of such allegations. We respectfully submit that this amendment to the order on the Pre-Trial Conference was proper.

**(b) Paragraph XVI**

In response to a question by the Court at the Pre-Trial Conference, counsel for defendant stated that the whole of paragraph XVI of the complaint was admitted.

Paragraph XVI is lengthy (covering approximately two and one-half pages of the printed record herein) and has for its subject the "Extent and Cumulative Character of Penalties for Violation of Train-Limit Law" (R. 40, 41, 42). Approximately midway through the paragraph appears the following allegation:

> "As heretofore alleged, said defendant claims and maintains that it is and will be his duty, as Attorney General, to prosecute and sue plaintiff for each and every violation of said Act which it may commit." (R. 41.)

In stating to the District Court that defendant admitted the whole of paragraph XVI counsel for defendant inadvertently overlooked and unintentionally admitted the above quoted part of the paragraph. Such admission is contrary to fact and erroneous, but was not discovered until the order of the District Court on the Pre-Trial Conference was received, when counsel for defendant immediately informed plaintiff of defendant's intention to move for an order amending the order of the Court by showing this allegation of the complaint to be denied by defendant. The amendment was ordered by the Court. The action of

the Court in amending the order was a proper exercise of the Court's discretion and to prevent a manifest injustice.

It is clear from the record that it was not the intention of the defendant to admit this allegation.

An allegation in paragraph XV almost identical with the above allegation of paragraph XVI was expressly denied at the Pre-Trial Conference (R. 87, 88, 89, 90).

> (The allegation in paragraph XV reads: "and said defendant further claims and maintains that, in the event of violation of said law by plaintiff, it is and will be his duty forthwith to institute or direct the institution of proceedings to recover from the plaintiff the penalties provided in said law and otherwise to enforce compliance therewith by plaintiff." R. 38.)

Again, a very similar allegation in paragraph I(b) of the complaint was denied at the Pre-Trial Conference (R. 75-79).

Certainly with these denials in the record of the Pre-Trial Conference the District Court was not warranted in asserting that defendant admitted these allegations. With these contradictions in the record there was no basis in the record to enter an order finding or holding that defendant either admitted or denied such allegations. The record being contradictory, it was proper for the Court to determine the true intent of the parties and correct the record accordingly. That the District Court did.

Upon any fair and impartial examination of the record it cannot be doubted that in admitting *all* the allegations of paragraph XVI the defendant inadvertently overlooked this allegation; and that the defendant in truth did not intend to admit such allegations but in fact denied the same. The answer of the defendant expressly denied this allegation as well as similar allegations in paragraphs

I(b) and XV. Also in his Affidavit in Support of Motion to Dismiss and in his deposition, placed in evidence by plaintiff, defendant denied that he maintained or claimed that the Train-Limit Law imposed any duty upon him to prosecute or direct prosecutions thereof (R. 47, 48, 132, 140, 141). And under no fair or honest interpretation of the record in this cause could it be stated that the defendant maintained that the Train-Limit Law imposed a duty on the defendant to prosecute or direct prosecution of violation *unless the law is constitutional.* And the record is uncontradicted that defendant admitted the allegations of the complaint going to the question of the constitutionality of the law. Not only has defendant never maintained, as plaintiff states (p. 41, Appellant's Brief) that the Train-Limit Law casts upon him the power and duty of enforcement, but defendant has consistently contended that if, as plaintiff contends, the Train-Limit Law is unconstitutional, then it does not impose any duty whatsoever on defendant (R. 47, 48, 53, 54, 65, 66, 67, 68). Certainly the defendant has never made the absurd contention that an unconstitutional law imposed a duty upon him. It then would have been an injustice to place in defendant's mouth a contention he did not make. It is absurd to argue, as plaintiff does (p. 42, Appellant's Brief), that no injustice can fall to defendant by having judgment rendered against him declaring the Train-Limit Law void. It is an injustice to defendant to attempt to compel him as an *individual* to bear the burden of defending a law in which he has no interest, to attempt to force upon him contentions he has never made, and to attempt to place upon him the burden and expense of litigation in which he has no interest.

The District Court properly amended the Order on the Pre-Trial Conference.

*Capano v. Melchionno* (Mass.), 7 N. E. 2d 593, 599.

## 2. A CASE OR CONTROVERSY WITHIN THE JUDICIAL POWER OF A UNITED STATES COURT IS NOT PRESENTED BY THE RECORD AND THE DISTRICT COURT PROPERLY DISMISSED THE SUIT.

**(Specification of Error Nos. 2 to 7 incl.)**

### FOREWORD

As appellant has stated (Appellant's Brief, 20), these specifications of error in effect relate to a single question, namely: Did the trial court err in concluding from the record below that no actual case or controversy is presented by the record herein within the scope of the judicial power of the United States Courts?

The plaintiff admits (Appellant's Brief, 21) that the trial record does *not* establish "any controversy between the parties as to the abstract question of the constitutionality of the Train-Limit Law, considered apart from the question of defendant's claimed power and duty of enforcement."

As plaintiff states, the defendant admitted the plaintiff's allegations of fact from which may be drawn the conclusion that the Arizona Train-Limit Law is unconstitutional and also admitted the paragraphs of the complaint in which the invalidity of the law was alleged in precise terms (Appellant's Brief, 22, 23). In other words, the plaintiff alleged, and defendant admitted, that the Train-Limit Law is unconstitutional. No issue or controversy could then be presented upon such question.

*Robinson v. Anderson,* 121 U. S. 522; 7 S. Ct. 1011.

But plaintiff contends that the defendant, although admitting the unconstitutionality of the law, asserts the power and duty on his part to enforce such unconstitutional law, and that a controversy is thereby presented. And in the words of the plaintiff, "the controversy relates, * * * not to the question of the constitutionality of the law, but

solely to the question whether the defendant *presently* (i. e., in advance of any final judicial determination) has any power or duty of enforcement in the event of violation."

We agree with plaintiff that no case or controversy is presented by the record as to the constitutionality of the Train-Limit Law. And since no case or controversy within the judicial power of a United States Court as to the constitutionality of the law is presented, no finding, judgment or decree touching its constitutionality may be entered.

We are not in agreement with the plaintiff that the record presents a case or controversy as to the defendant's power or duty of enforcement in the event of a violation of the law. And since plaintiff's contention is "solely to the question whether the defendant *presently* (i. e., in advance of any final judicial determination) has any power or duty of enforcement in case of violation" (Appellant's Brief, 23) the sole question presented by Specification of of Error Nos. 2 to 7 is whether or not the record presents a case or controversy as to the defendant's power or duty of enforcement in case of violation of the law.

**(a) No opposing claims are presented in the record as to the constitutionality of the Arizona Train-Limit Law or as to the powers and duties of the defendant with respect to the enforcement of the Arizona Train-Limit Law, and so no controversy.**

**(Specification of Error Nos. 2 and 3)**

1. Defendant never claimed nor maintained the Arizona Train-Limit Law is constitutional or imposed upon him, either in his individual or official capacity, a power or duty of enforcement.

It is, perhaps, proper to first point out that the purpose of the action is to obtain a declaratory judgment declaring *the Arizona Train-Limit Law unconstitutional.* It is so

stated by plaintiff in the jurisdictional paragraph of its complaint (R. 4) and at page 3 of its brief. An examination of the jurisdictional paragraph of plaintiff's complaint (R. 4) discloses that the question of defendant's duty is not the purpose of, nor put in issue by, the action.

Defendant has never claimed the power or duty to enforce the Train-Limit Law. On the contrary, he has admitted its invalidity and denied any duty to enforce an unconstitutional law, thus denying any duty to enforce the Train-Limit Law.

However, plaintiff here, in its effort to show a controversy, asserts that the defendant, although admitting and agreeing the law is unconstitutional, claims and maintains he has the power and duty to enforce the Train-Limit Law in event of violation and that such position or contention by the defendant in this regard is shown by the admissions and assertions in his testimony on deposition, and on his behalf at the Pre-Trial Conference, and *solely* on this contention bases its claim that a controversy exists. It therefore becomes necessary to determine from the record just what the defendant does claim and maintain as to his power or duty of enforcement.

The affidavit of the defendant was filed in support of his *motion to dismiss*. In this affidavit the defendant stated that he "does not claim or maintain, and has not claimed or maintained, * * * that in the event of violation of said law by plaintiff it is or will be affiant's duty to institute or to direct the institution of proceedings to recover from the plaintiff the penalties provided in said law or otherwise to enforce compliance therewith by plaintiff. In this connection affiant says that in his individual capacity, the capacity in which he is here sued, the affiant has no duty or authority in connection therewith, and has no interest in the determination of the validity or constitu-

tionality of said Arizona Train-Limit Law; that if said Arizona Train-Limit Law is unconstitutional, as plaintiff contends, affiant in his official capacity as Attorney General of the State of Arizona has no duty or authority to enforce said Arizona Train-Limit Law and has no duty to perform in connection with said law" (R. 47, 48).

In paragraph IV of his *answer* (R .53) defendant denied that the Train-Limit Law imposed any power or duty in him in his individual capacity and alleged that *only if it was constitutional* did it impose a duty upon him in his official capacity.

In paragraph XXII (R. 65) and paragraph XXIII (R. 68) of his *answer* the defendant expressly denied that he claims or maintains that is or will be his duty to institute or direct the institution of actions against plaintiff in the event of violation of the law.

Defendant's statements at the *Pre-Trial Conference* were in accord with those in his answer, referred to above, except that an allegation in paragraph XVI of the complaint was overlooked and inadvertently admitted. But such admission was, on motion and order of the Court, corrected before trial. (See argument under Specification of Error No. 1.)

And finally, in his *deposition* defendant denied that any duty was imposed upon him by the Train-Limit Law unless the law is constitutional (R. 132, 141).

The foregoing constitutes the record insofar as it relates to allegations or statements of the defendant with respect to his duties under the Train-Limit Law. From this record—Defendant's Affidavit in Support of Motion to Dismiss, Defendant's Answer, Defendant's Deposition, and Defendant's Admissions on Pre-Trial Conference—it is clear that the defendant has, and does, claim and maintain

that the law imposes *no* duty upon him in his individual capacity, and imposes a duty upon him in his official capacity *only if it is constitutional.* And since he admitted the law is unconstitutional, he, as does plaintiff, claims that *no* duty or power is imposed by the law.

The statement, then, by plaintiff (Appellant's Brief, 23) that defendant asserts and maintains that the power and duty of enforcement exists in him, even though the law is unconstitutional, is not only not sustained by the record but is contrary to the record.

It must follow, then, that no controversy is presented unless, as plaintiff contends (Appellant's Brief, 23) defendant, by taking his oath of office and thereby stating his intention to fulfill the duties of the office, and by failing to disavow any intention to enforce the Train-Limit Law, evidences a claim of duty to enforce the Train-Limit Law.

2. No duty of enforcement is imposed upon defendant, either in his individual or official capacity, by reason of a presumption in favor of the constitutionality of the law.

Upon this proposition a rather peculiar or unusual situation is presented. In its effort to find a controversy plaintiff states that defendant "claims and asserts that the power and duty of prosecution nevertheless continue" notwithstanding the law is unconstitutional. The argument then made *by plaintiff* is *not against but in support* of *defendant's* supposed claim or contention.

In other words, while asserting that such contention is on the part of defendant, plaintiff proceeds to present argument, not against but in support thereof.

The truth is, defendant never has, and does not now, claim or maintain that the Train-Limit Law if unconstitutional imposed any power or duty upon him. On the

contrary, defendant has contended and does contend that *neither* his oath of office *nor* the Train-Limit Law, if such law is unconstitutional (and it was admitted to be unconstitutional) imposed *any* power or duty upon him either in his official or individual capacity.

The oath of office taken by the Attorney General is that he will "support the Constitution of the United States and the Constitution and Laws of the State of Arizona * * *'. (Sec. 63, Revised Code Arizona 1928). The Attorney General, by refusing to enforce an unconstitutional act does not violate this oath of office.

> "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

*Norton v. County of Selby,* 118 U. S. 425; 6 S. Ct. 1121.

And see:

*Chicago etc. Co. v. Hackett,* 228 U. S. 559; 33 S. Ct. 581.

*Ex Parte La Prade*, 289 U. S. 444; 53 S. Ct. 682.

*Little Rock etc. Co. v. Worthen,* 120 U. S. 97; 7 S. Ct. 469.

And to enforce, or attempt to enforce, an unconstitutional act would violate his oath to support the Constitution of the United States.

The plaintiff argues that the duty is, and was, on the part of the defendant to disavow his intention to enforce the Train-Limit Law and that failure to disavow constitutes a threat.

This contention, if sustained, would require the Attorney General immediately upon taking office to examine

into and formulate an opinion as to the constitutionality of *every* law, the duty of enforcing which is imposed upon him, although no occasion for the exercise of such duty has arisen, and disavow his intention to enforce each such law or risk the possibility of being required in his individual capacity and at his own expense to sustain in court the constitutionality of *each* law to which no disavowal is made. Such a contention is absurd. No law, state or federal, imposes such a duty upon an officer. As the Supreme Court has said, *an unconstitutional act is no law.*

The so-called "negative order" cases, cited by plaintiff, have no application. Those cases involved action, not inaction, on the part of the defendant. The boards or commissions there were authorized to act, and did act, upon the petitions filed before them. Their action was negative—that is, denied the petition—but it was action nevertheless. Such is not the case here.

In its brief (Appellant's Brief, 29-30) plaintiff argues that the oath of office of defendant together with the declaration of the statute imposing upon defendant the duty of enforcement constitutes a threat or a claim of duty to enforce, which, under the La Prade case, supra, can only be avoided by a disavowal of such duty.

But the La Prade case did not hold as plaintiff contends. On the contrary, the Supreme Court in the La Prade case said that "The mere declaration of the statute that suits for recovery of penalties shall be brought by the Attorney General is not sufficient" (page 458 of opinion) to constitute a threat. This is in harmony with the opinions cited supra holding that an unconstitutional law is no law and imposes no duties. If such statutory declaration is not sufficient to constitute a threat, it cannot constitute a claim of power and duty to enforce the statute requiring a disavowal by defendant.

And it is submitted that if a disavowal were necessary the defendant's admission that the law is unconstitutional and his denial of any duty of enforcement under an unconstitutional act is a disavowal.

The Supreme Court of the United States has several times held that where the defendant files a disclaimer or admits the contentions of the plaintiff, thus tendering no issue, no case or controversy is presented and the Court shall proceed no further but at once dismiss.

*Robinson v. Anderson,* 121 U. S. 522; 7 S. Ct. 1011.

*Devine v. Los Angeles,* 202 U. S. 313; 26 S. Ct. 652.

*Crystal Sprgs. etc. Co. v. Los Angeles,* 177 U. S. 169; 20 S. Ct. 573.

*Rosenbaum v. Bauer,* 120 U. S. 450; 7 S. Ct. 633.

And see Jud. Code, Par. 37; 28 U. S. C. 80.

Here it was the duty of the District Court to dismiss the action when defendant filed his answer admitting plaintiff's contentions and disclaiming any opposing contention.

Nor was any controversy thereafter presented. As is seen from the record defendant at all times admitted the act was unconstitutional, and asserted that no duty was imposed upon him to enforce it. No case or controversy was presented and the case was properly dismissed.

**(b) If opposing claims were presented, the question is academic and presents no case or controversy within the judicial power of a United States Court.**

**(Specification of Error Nos. 4, 5, 6 and 7)**

The plaintiff concedes that no case or controversy is presented by the trial record upon the question of the constitutionality of the Train-Limit Law (Appellant's Brief,

21, 23). The *sole question* (and thus the sole contention on plaintiff's part) presented by Specification of Error Nos. 2 to 7 is that a case or controversy is presented as to whether the defendant "has any power or duty of enforcement in case of violation" of the Train-Limit Law (Appellant's Brief, 23).

The evidence is uncontradicted that there had been no violation of the Train-Limit Law (R. 49, 140, 141).

Likewise the evidence is undisputed that there had been no act or threat on the part of the defendant to enforce the law. In his Affidavit in Support of Motion to Dismiss (R. 47, 48), placed in evidence by the plaintiff, defendant denied that he had any duty whatsoever, in his individual capacity, to enforce the law, and denied that he had any duty in his official capacity if the law was unconstitutional. Further, he stated that he had made no study of the law and had formed no opinion as to its constitutionality or unconstitutionality.

In his answer he admitted the allegations of the complaint going to the validity of the act and denied he claimed or maintained that the law imposed a duty upon him to enforce it if it is unconstitutional. In other words, he admitted the law was unconstitutional and denied that such unconstitutional law imposed any duty of enforcement upon him (R. 53, 65, 68). Surely this could not be construed as a threat to enforce the law.

In his deposition he stated that since there had been no violation of the law called to his attention, he had had no occasion to consider the law and had formed no opinion as to its validity or invalidity (R. 140); that before he would take any steps to enforce the law he certainly would spend some time to go into the law and determine its validity or invalidity (R. 141).

Finally, at the Pre-Trial Conference he admitted the act was unconstitutional and denied any duty to enforce an unconstitutional law (R. 76, 86-91).

From this it is seen that the defendant has denied any act or threat on his part to enforce the law, and there is no evidence to the contrary.

Since there has been no violation, no act or threat to enforce, there is no present situation, no present right or status or relation to which a judgment declaring the duty of the defendant, either in his individual or official capacity, can apply.

Upon the record the question presented is purely abstract and hypothetical. No present status or relation is shown calling for the exercise or performance of the power or duty set forth in the act. No violation has occurred and so no occasion exists calling for the present performance of any duty under the law. Any judgment or decree entered upon this record would be purely advisory, applying, not to a present existing situation, but to a contingent and hypothetical future situation which might never arise —a decree advising Conway, as Attorney General (not the defendant Conway in his individual capacity) as to his power and duty in the future should a violation of the law occur. Such a record presents no case or controversy within the judicial power of a United States Court.

*Liberty Warehouse Co. v. Grannis*, 273 U. S. 70; 47 S. Ct. 282.

*Muskrat v. United States*, 219 U. S. 346, 357; 31 S. Ct. 250.

*Fairchild v. Hughes*, 258 U. S. 126, 129; 42 S. Ct. 274.

*Massachusetts v. Mellon*, 262 U. S. 447, 448; 43 S. Ct. 597.

*New Jersey v. Sargent*, 269 U. S. 328, 330; 46 S. Ct. 122.

*California v. San Pablo & T. R. Co.*, 149 U. S. 308; 13 S. Ct. 876.

The operation of the Declaratory Judgment Act is procedural only.

"It does not purport to alter the character of controversies which are the subject of judicial power under the Constitution."

*United States v. West Virginia*, 295 U. S. 463; 55 S. Ct. 789.

*Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227; 57 S. Ct. 461.

*Ashwander v. Tenn. Valley Auth.*, 297 U. S. 288; 56 S. Ct. 466.

"The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests."

*Aetna Ins. Co. v. Haworth, supra.*

"* * * it is not open to question that the judicial power vested by Article 3 of the Constitution * * * is limited to cases and controversies presented in such form, with adverse litigants, that the judicial power is capable of acting upon them, and pronouncing and carrying into effect a judgment between the parties, and does not extend to the determination of abstract questions or issues framed for the purpose of invoking the advice of the court without real parties or a real case."

*Liberty Warehouse Co. v. Grannis, supra.*

No definite or concrete controversy is presented here—only a hypothetical or abstract situation which may never occur. No judgment could be pronounced which could be carried into effect. There are no acts or threats to enforce

the law which may be enjoined as in *Ex Parte Young*, 209 U. S. 123; 28 S. Ct. 441.

Even if the law is constitutional, it imposes no duty on Conway *in his official capacity as Attorney General* until there has been a violation. There having been no violation, any judgment entered can only be to advise the Attorney General as to his duties in event there should be a violation.

No justiciable controversy is presented and the action was properly dismissed.

**(c) The defendant, Joe Conway, in his individual capacity, the capacity in which he is sued, has no interest in the subject matter of the complaint and action sufficient to give rise to a controversy.**

**(Specification of Error Nos. 2 to 7 incl.)**

The defendant, Joe Conway, is the duly elected and acting Attorney General of the State of Arizona. In this action, however, he is sued *in his individual capacity* and not in his official capacity as Attorney General (R. 3).

No legal relation exists between the defendant in his individual capacity (the capacity in which he is here sued) and the plaintiff by reason of or in relation to the Arizona Train-Limit Law. No legal interest of the defendant in his individual capacity, adverse to the interest of the plaintiff or otherwise, is affected by such law. Defendant in his individual capacity will neither be injured by the law being held unconstitutional nor benefited by its constitutionality being sustained. He "has merely a general interest common to all members of the public." That is not a sufficient interest to entitle the defendant to invoke the jurisdiction of a United States Court.

> "* * * The motion papers disclose no interest upon the part of the petitioner other than that of a citizen and a member of the bar of this Court. That is in-

sufficient. It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained, or is immediately in danger of sustaining, a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public."

*Ex Parte Levitt*, 302 U. S. 633; 58 S. Ct. 1.

And see:

*Ashwander v. Tenn Valley Auth.*, 297 U. S. 288; 56 S. Ct. 466.

*U. S. v. West Virginia*, 295 U. S. 463; 55 S. Ct. 789.

*Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227, 241; 57 S. Ct. 461, 464.

*California v. San Pablo & T. R. Co.*, 149 U. S. 308; 13 S. Ct. 876.

*Ex Parte Levitt*, 302 U. S. 633, 634; 58 St. Ct. 1; 82 L. Ed. 493.

*Tyler v. Judges of Court of Reg.*, 179 U. S. 405, 406; 21 S. Ct. 206; 45 L. Ed. 252.

*Southern Ry. Co. v. King*, 217 U. S. 524, 534; 30 S. Ct. 594; 54 L. Ed. 868.

*Newman v. U. S.*, 238 U. S. 537, 549, 550; 35 S. Ct. 881; 59 L. Ed. 1446.

*Fairchild v. Hughes*, 258 U. S. 126; 42 S. Ct. 274; 66 L. Ed. 499.

*Massachusetts v. Mellon*, 262 U. S. 447, 448; 43 S. Ct. 597, 601; 67 L. Ed. 1078.

*New Jersey v. Sargent*, 269 U. S. 328; 46 S. Ct. 122.

*Electric Bond & Share Co. v. Sec. Exch. Comm.*, 303 U. S. 419; 58 S. Ct. 678.

*John P. Agnew & Co. v. Haage*, 99 Fed. (2d) 349.

*Southern Pacific Co. v. McAdoo,* 82 Fed. (2d) 121.

*Bettis v. Patterson Ballogh Corp.,* 16 Fed. Supp. 455.

*Bogus Motor Co. v. Omerdonk,* 9 Fed. Supp. 950.

*Holt v. Custer County (Mont.),* 243 Pac. 811.

*Miller v. Miller (Tenn.),* 261 S. W. 965.

*Garden City News v. Hurst (Kan.),* 282 Pac. 720.

*State Ex. rel La Follette v. Damman (Wis.),* 264 N. W. 627.

*Washington Beauty College v. Huse (Wash.),* 80 Pac. (2d) 403.

*Oregon etc. Assoc. v. White (Ore.),* 78 Pac. (2d) 572.

*Washington-Detroit Theatre Co. v. Moore (Mich.),* 229 N. W. 618.

*Burton v. Durham Realty Co.,* 188 N. C. 473; 125 S. E. 3.

It can hardly be doubted that if this action were *brought* by Conway in his individual capacity it must be dismissed because, as to the question of the constitutionality of the law or the official duties it may impose upon the Attorney General, he, in his individual capacity, "has merely a general interest common to all members of the public," and such an interest is not sufficient to invoke the jurisdiction of the courts of the United States. By what magic is he, as a defendant, clothed with an interest which he does not have as a plaintiff?

But plaintiff contends the Supreme Court in effect has held in *Ex Parte Young, supra,* and other similar cases, that the interest necessary to sustain jurisdiction does exist in the defendant.

The rule adopted in *Ex Parte Young* and similar cases has no application here. In those cases the subject matter

of the action was the *individual act or threatened act* of the defendant. The question before the Court was whether or not the individual action or threatened action of the defendant was rightful or wrongful and should be enjoined. In determining that question, and *incidental* thereto, the constitutionality of a statute was brought in question. But it was the individual act or threatened *act* which was the *subject matter* of the suit and not the constitutionality of the statute.

> "Petitioner does not deny that a suit nominally against individuals, but restraining or otherwise affecting their action as state officers, may be in substance a suit against the state, which the Constitution forbids, (citing cases) or that generally suits to restrain *action* of state officials can, consistently with the constitutional prohibition, be prosecuted only when the action sought to be restrained is without the authority of state law or contravenes the statutes or Constitution of the United States." (Italics ours.)
>
> *Worcester County Trust Co. v. Riley*, 58 S. Ct. 185, 302 U. S. 292.

It goes without question that a defendant has an interest individually in a suit which involves his individual action.

Here the subject matter of the suit is the constitutionality of the Arizona Train-Limit Law. In the jurisdictional paragraph of its complaint (R. 4) plaintiff alleges that the suit is to obtain a final judgment declaring the Arizona Train-Limit Law unconstitutional. In that question the defendant has no interest. In its brief plaintiff concedes no controversy on this question is presented by the record (R. 21, 23).

But plaintiff *here* contends that a controversy is presented as to the powers and duties of the defendant with respect to the enforcement of the law. Such a question, if presented by the pleadings, would relate to Conway in his official capacity and not to the defendant, Conway, in his

individual capacity. No one, at least not the defendant, has ever contended that Conway in his individual capacity has any power or authority of enforcing the law. On the contrary, Conway has disclaimed such power or authority (R. 47). Any question, then, as to power or authority of enforcement under the law must relate to the official capacity. The defendant, Conway the individual, has no interest in the powers or duties of Conway the official.

And in *Ex Parte Young* and similar cases *some act* or *threat* by the defendant was held necessary as the subject matter of the suit in order to give jurisdiction.

> "The various authorities we have referred to furnish ample justification for the assertion that individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, *and who threaten and are about to commence proceedings*, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action." (Italics ours.)
>
> *Ex Parte Young, supra.*

And see *Champlin Refining Co. v. Corp. Comm.*, 286 U. S. 210, 238; 52 S. Ct. 559, 566, wherein the Court denied an injunction as to Section 9 of the Oklahoma Petroleum Act for want of jurisdiction for the reason that the plaintiff had failed to sustain the burden of showing some act or threat by the defendant to enforce.

> *Worcester County Trust Co. v. Riley*, 302 U. S. 292; 58 S. Ct. 185.

Plaintiff concedes that there had been no act or threat of prosecution by the defendant prior to April 19, 1940 (Appellant's Brief, 53). The action here before the Court was filed in the District Court April 18, 1939 (R. 45). There was then—when this action was filed—an absolute

want of jurisdiction in the District Court to *enjoin* the defendant.

*Ex Parte Young, supra.*

*Champlin Refining Co. v. Corp. Comm., supra.*

It follows that plaintiff's argument that jurisdiction lies to enter a declaratory judgment in any suit where an injunction could be entered, is meaningless and without application.

Not only is there an entire lack of evidence of any act or threat by this defendant, but the evidence is uncontradicted that the defendant consistently in the Trial Court denied any power or duty in him to enforce the Train-Limit Law if unconstitutional and admitted its unconstitutionality. In other words, he denied any power or authority existed in him to enforce the law.

And finally we submit that no question as to the powers or duties of enforcement is presented for decision by the complaint. The allegation of the jurisdictional paragraph of the complaint is that the suit is for a judgment declaring the Train-Limit Law unconstitutional (R. 4) and no issue as to the power or duty of enforcement is presented.

The case of *Nashville, Chattanooga & St. Louis Ry. Co. v. Wallace,* 288 U. S. 249; 53 S. Ct. 345; is cited by plaintiff as a case on all fours with the instant case.

The *Wallace case* was a suit brought in the state court under the Tennessee Declaratory Judgment Act to determine the constitutionality of a Tennessee statute imposing an excise tax on the storage of gasoline. The *Wallace case differs* from the case before this Court in at least two important particulars:

(a) The statute imposed an immediate liability for the tax and a duty on the officers to enforce. Thus

a definite and concrete controversy was presented, while no violation of the Train-Limit Law having occurred only an abstract or hypothetical case is presented here.

(b) In the *Wallace case* the defendants were the state officers upon whom the power and duty of enforcing the tax was imposed by the statute and were sued in their *official capacity*. As the representative of the state upon whom the duty of enforcement was imposed, they had an interest in their *official* capacity which would be affected by the determination of the constitutionality of the statute. Here the defendant in his individual capacity—the capacity in which he is sued—has no interest which will be affected by the determination of the constitutionality of the Train-Limit Law.

In *Aetna v. Haworth, supra,* the defendant, as an insured, claimed a *present* right against the insurance company under a policy of insurance. The right or liability claimed was definite and concrete and the determination of his rights under the policy definitely affected his interest.

Likewise in the patent infringement cases the claim was of a present liability for infringement—a definite and concrete controversy—and the rights and interest of the parties were affected by the determination of the question of infringement.

The several other cases cited by plaintiff fall into one of the foregoing class or type.

### 3. THE ACTION IS AGAINST THE STATE OF ARIZONA AND BARRED BY THE ELEVENTH AMENDMENT TO THE CONSTITUTION.

**(Specification of Error Nos. 2 to 7 incl.)**

In *Ex Parte Young, supra,* the defendant was stripped of his official character and subjected in his person to the consequences of his individual conduct.

Here the plaintiff seeks to make a reverse application of the doctrine of *Ex Parte Young.*

For the purpose of providing an interest in the defendant sufficient to invoke the jurisdiction of the court the plaintiff seeks to clothe the defendant Conway—sued in his individual capacity—with his official or representative character and subject him individually to the consequences of such official character.

The plaintiff argues that the defendant has an interest and will be affected by a determination of the constitutionality of the Train-Limit Law and the powers and duties of the Attorney General thereunder because upon the defendant as Attorney General exclusively is imposed the power and duty of enforcement. (And plaintiff assigns as error the failure of the Trial Court to find, irrespective of defendant's beliefs or admissions that the law is unconstitutional and imposed no duty upon him, that it is his *official* duty to enforce the law until it is judicially declared invalid. Specification of Error No. 3.)

But the power and duty imposed by the act is upon the Attorney General—Conway in his official capacity and as representative of the State—and not upon the defendant in his individual capacity, the capacity in which he is here sued.

When it becomes necessary, as here, to clothe the defendant with his official and representative capacity in

order to create an interest in him sufficient to sustain the jurisdiction of the Court, the suit becomes one against the State and is barred by the Eleventh Amendment to the Constitution of the United States.

*Worcester County Trust Co. v. Riley,* 302 U. S. 292; 58 S. Ct. 185.

*Ex Parte Young, supra.*

As we have heretofore pointed out, the presumption that an act is constitutional is merely a rule of statutory construction—a rule of evidence—and has no application to the duties of an officer under an act. He is not bound by such presumption to accept the law as constitutional and act under it. On the contrary, in performing the duties imposed upon him under a statute the officer acts at his peril. If he acts under an unconstitutional law, he is personally liable for his acts.

*Norton v. Shelby Co.,* 118 U. S. 425; 6 S. Ct. 1121.

*Norwood v. Goldsmith,* 168 Ala. 224; 53 So. 84.

*Dennison Mfg. Co. v. Wright,* 156 Ga. 789; 120 S. E. 120.

*Highway Commrs. v. Bloomington,* 253 Ill. 164; 97 N. E. 280.

*Saratoga etc. Waters Corp. v. Pratt,* 227 N. Y. 429; 125 N. E. 834.

*Cartwright v. Canode,* 106 Tex. 502; 171 S. W. 696.

It must follow that if he is personally liable for acting under an unconstitutional act he may, if he considers the law unconstitutional, refuse to incur the liability.

*Ex Parte Young,* and cases following it, have held that an officer who purports to act under an unconstitutional act is acting in his individual capacity and is doing an individual wrong. If such doctrine is sound, it must follow

that he has the right to determine whether or not he shall commit such wrong. If he has no discretion—no right to exercise his own judgment—then his acts are by reason of his office and the suit would be against the State.

In one breath it is argued, following the doctrine of *Ex Parte Young*, that if the law is unconstitutional an officer in enforcing it is doing an act which he had no legal right to do. And in the next breath, that the presumption of unconstitutionality imposes a legal duty upon the officer to enforce the law—that is, to do an act which the Supreme Court in *Ex Parte Young*, and cases following it, has said he has "no legal right to do." Clearly a contention without merit.

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### 4. THE MOTION TO REMAND WAS PROPERLY DENIED.

Reference is made by the plaintiff to the matter presented by its motion to remand and defendant's response, and plaintiff contends that if a doubt existed as to defendant's interest, such doubt is now removed (R. 83).

**(a) The matter sought to be presented by supplemental complaint has no relevancy to the question raised by the original record.**

This appeal and the question as to whether or not a case or controversy is presented must be determined upon the facts and situation existing when the action was filed.

*Minneapolis & St. L. R. Co. v. Peoria P. U. R. Co.*, 270 U. S. 580; 46 S. Ct. 402.

*Mullen v. Torrance*, 9 Wheat. 537; 6 L. Ed. 154.

*Anderson v. Watt*, 138 U. S. 694; 11 S. Ct. 449.

*National Cash Reg. Co. v. Stoltz*, 135 Fed. 534.

Plaintiff in its brief has several times stated that the defendant asserts and contends that he has the power and duty of prosecution under the law (R. 23, 31, 33, 46, 50). These statements are directly contrary to the facts appearing in the record.

In his Affidavit in Support of Motion to Dismiss, his answer, and in his deposition the defendant denied that he had any power or duty of enforcement in his individual capacity, and denied that, in his official capacity, he had any power or duty of enforcement if the law is unconstitutional. He alleged that, so far as he knew, there had been no violation of the law and no occasion for him to investigate as to its constitutionality. And that he had made no study, investigation or examination into the quesion of the constitutionality of the law and had formulated no opinion as to its constitutionality or unconstitutionality. In his answer he further alleged that in his individual capacity, the capacity in which he was sued, he had no interest in the determination of the question of the constitutionality of the law and therefore admitted the allegaions of the complaint as to the invalidity of the law.

At the Pre-Trial Conference, he, in effect, admitted the law is unconstitutional and denied any duty to enforce an unconstitutional law.

Such record wholly refutes these statements made by plaintiff.

This suit was filed on the 18th day of April, 1939. The record is uncontradicted that there was no act or threat on the part of the defendant to enforce the law prior to April 19, 1940.

This suit is entirely unlike *Ex Parte Young* and similar cases because:

(a) Since there had been no act or threat by the defendant, the individual action of the defendant could

not be the subject matter of the suit, and no such action is alleged by the complaint.

(b) In *Ex Parte Young* the liability was immediate and by reason of the threat of enforcement the controversy was definite and concrete, while here, there having been no violation of the law and no threat of enforcement, the controversy, if any, is abstract and hypothetical.

The judgment was entered in the Trial Court on February 14, 1940 (R. 116). The first violation of the Train-Limit Law occurred April 4, 1940 (Exhibit, attached to plaintiff's Motion to Remand), nearly two months after the judgment was entered below. Until such violation occurred the law, if constitutional, imposed no duty of enforcement upon the defendant and no duty nor necessity of investigating as to its constitutionality. Neither his oath of office nor the laws of the State of Arizona require the Attorney General upon taking office to investigate and announce his opinion upon the validity of the many laws with respect to which duties are imposed upon him. It is only when occasion has arisen which would require the exercise of his duties that the necessity arises for him to formulate his opinion and judgment as to the constitutionality of the law.

The action by the State of Arizona to enforce the law was filed in the state court on the 19th day of April, 1940, some two weeks after the violation. That the Attorney General, an occasion having arisen calling for the exercise of his duties if the law is valid, examined into its constitutionality, formulated his opinion, and, some two weeks after the violation, filed an action on behalf of the State to enforce the law, is no evidence whatever to contradict the record that at the time this suit was filed and when judgment was entered, there had been no act or threat on

the part of the defendant to enforce the law, and is entirely irrelevant and immaterial upon the question of whether or not a case or controversy existed when the suit was filed.

It has no material bearing upon the question of whether or not a controversy existed when the action was filed; it in no way confirms the action sought to be pleaded; it cures no jurisdictional defect; it in no way establishes or tends to establish the claim or intention of defendant at the time the action was filed and before a violation.

**(b) The situation presented by the Motion to Remand and response thereto shows the jurisdictional amount is not involved.**

From the matter appearing in plaintiff's Motion to Remand, and defendant's response thereto, it is seen that the action filed in the state court covers two violations. Under the Train-Limit Law, if valid, the total penalty which could be imposed is $1,000 for each violation, or a total of $2,000 for the two violations alleged in that complaint. From defendant's response it will be seen that an order was entered by the state court staying all other proceedings pendings the determination of that action. Also that the defendant has stated under oath that he will not prosecute any other actions pending the determination of that action, and then only if the law is held constitutional. The action places no restriction upon the length, kind or character of trains the plaintiff operates. It may do as it pleases.

It is clear from the foregoing that if any controversy *now* exists between plaintiff and defendant the amount involved is limited to $2,000, the penalties for the violations charged.

The bringing of any further actions is contingent upon the law being held constitutional, presenting only an abstract or hypothetical situation. And the defendant has

denied an intention to prosecute further violations if the law is held unconstitutional. He cannot as to further violations be charged, then, with threatening an individual wrong.

The penalty of $2,000 being less than the amount necessary for federal jurisdiction, the suit would be dismissed immediately upon such matters appearing.

*Healy v. Ratta,* 292 U. S. 263; 54 S. Ct. 700.

*Washington etc. Co. v. District,* 146 U. S. 227; 13 S. Ct. 64.

*Holt v. Indiana Mfg. Co.,* 176 U. S. 68; 20 S. Ct. 272.

*Citizens Bank v. Cannon,* 164 U. S. 319; 17 S. Ct. 89.

**(c) The situation presented by the Motion to Remand and response thereto shows a want of equity jurisdiction.**

An action under the Declaratory Judgment Act is an equitable action.

*Lumberman's etc. Co. v. McIver,* 27 Fed. Supp. 702.

*Ohio Cas. Ins. Co. v. Plummer,* 13 Fed. Supp. 169.

A stay order having been entered, there can be no grounds for equitable relief and the facts presented show a want of equity jurisdiction.

*Champlin Refining Co. v. Corp. Comm., supra.*

To avoid repetition in the record, we incorporate herein by reference in opposition to the Motion to Remand the argument and authorities presented in our memorandum filed in opposition to the Motion to Remand.

## CONCLUSION

There is not presented here a case in which the defendant is attempting to prevent the determination of the question of the constitutionality of the Train-Limit Law in a proper action within the jurisdiction of the Court brought against a proper party having an interest in the determination of the question.

The defendant is seeking to protect his elemental rights as an individual and citizen that he may not be brought into court charged and adjudged guilty of committing an individual wrong when his only wrong, if wrong it be, is that he was elected and qualified as Attorney General of the State of Arizona; that he be not held *personally liable* in a judgment against him for costs in an action in which he has no personal interest; and that he not be subjected to the *personal burden and expense* of defending the constitutionality of an act which he has never undertaken or threatened to enforce.

He is seeking to defend his individual rights against the dangerous proposition advocated by the plaintiff that one who qualifies as a state officer assumes *personally and in his individual capacity* the responsibility and financial expense of defending the constitutionality of *every state law* the enforcement of which is imposed upon his office.

We are constrained to agree with plaintiff that the case presents an unusual situation, but we do not agree that the "fallacious pretense," to which plaintiff refers, is on the part of the defendant.

We cannot believe that any Court will approve the proposition that the constitutionality of a state law may be determined in an action against an officer in his individual capacity merely because the duty of enforcement is imposed in his office. To do so would be, in effect, to reduce to

*ex parte* hearings suits to determine the constitutionality of action by the highest legislative body of a state.

We respectfully submit that the judgment below should be affirmed.

Respectfully submitted,

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